

# **WORLD RUGBY TRANSGENDER WORKSHOP**

**25th & 26th February 2020**

**Tim O'Connor BL**

**Legal Liability and Transgender  
Rugby - Questions and Issues**

- General Principles of liability
- Examples and precedents in sport
- Global perspectives
- Lawful discrimination in the context of protection against harm or injury
- Precedents from gendered sports - weight categories and legal cases
- Evidence threshold required to prove the risk of harm/injury
- World Rugby liability

## Outline

- Common Law and Civil Law countries
- Common Law
  - England & Wales, Ireland, NI, NZ, Australia, Canada
- Civil Law
  - France, Italy, South Africa, Scotland.
  - Aquilian action, delict.
- World Rugby default law is E&W - Common Law
- Uses precedents as guidelines to the law.

## Legal Parameters

- Liability for breach of duty causing injury
- Won't be imposed if just breach of duty; needs to be proportionate
- Don't need to make sports risk-free/perfect
- Can't make them more dangerous than they need be in the nature of the sport

## General Principles

- “Dancing is a contact sport. Rugby is a collision sport” - Heyneke Meyer
- Intrinsically more dangerous
- Courts recognise this, and accept the higher risk

## Collision Sports

- Sued then-IRB for failure to take steps to make scrums safe.
- IRB not liable because of unincorporated nature - now changed
- Court looked at and stressed the inherent risks of the game.
- Accepted didn't have a positive duty to make the game risk-free; hadn't "increased the risk of harm".
- Haylen v. NSW RU Ltd. [2000] NSWSC 114

**Agar v. Hyde [2000] HCA 41**

- “Long thin neck” case.
- Policy that players with long, thin necks weren’t to play in the front row.
- Information packs not distributed.
- Player suffered catastrophic spinal injury
- Liability because failed to follow through on policy and steps.
- But: Green v Country Rugby Football League of NSW Inc. [2008] NSWSC

## Watson v. Haines (1987) Aust Tort Reports

- Underage player in front row of a scrum
- Non-stop collapsed scrums
- Catastrophic spinal injury due to a collapsed scrum
- Scrum laws made for player safety not followed
- Total failure to follow laws made for player safety meant liability imposed
- Important detail: stress on law being made to protect underage players from physical mismatch

**Smoldon v. Whitworth [1996] EWCA 1225**

- Local derby
- Non-front row player went into front row for last scrum
- Scrum collapsed, a different player in the front row suffered a catastrophic spinal injury
- Referee liable because failed to follow laws of game made for player safety

**Vowles v. Evans & WRU [2003]**  
**EWCA Civ 318**

- “Jackknife” case.
- Underage match in Stellenbosch
- Deliberately closed the gap for the prop’s head on the engage - catastrophic injury
- Liability on players for ignoring laws made for player safety

Roux v. Hattingh [2011] ZAWCHC  
100

- World title bout; inadequate ring-side medical assistance for knocked-out boxer
- Suffered serious brain injury as a result
- Duty to take reasonable actions to minimise inherent risks of the sport
- Failure to do so can result in liability

**Watson v British Boxing Board of Control [2001] QB 1134**

- Boy one year older, playing at the next age group down, injured another boy in the tackle, breaking his elbow.
- Age-rule made for player safety.
  - 17 “If [the age-rule] is applied as it "normally" should be, it is guidance there to protect smaller less mature boys from being injured by larger and more mature boys whether in incidents which involve legal tackles or illegal tackles. In my view the judge was right in saying that MM was entitled to its protection. ....
  - 26 I have no doubt that in that context the judge was holding rightly that the increased risk that the rule was meant to guard against eventuated i.e. RK's maturity, size and weight contributed materially to the injury MM suffered.

- Don't have to make the game absolutely safe
- Do have to reduce the inherent risks if possible within nature of game
- Steps taken that increase possibility of harm a bad idea
- Make it more dangerous by removing a law change made for safety = possible liability
- If ignore laws made to make it safer, then it causes trouble

## General Principles - Summary

- Risk assessment to make sure not more dangerous
- Examples
  - ELVs
  - Tackle laws
  - Goggles

## Law Changes

- Underage lineout limits
- Underage scrummaging limits
- Underage tackle laws
- U-19 scrummaging variations
- Age-based segregation
- Sex-based segregation

## Existing Laws For Safety

“It is recommended that contact sports and sports that have the potential for contact that sanction mixed-sex competitive sport, undertake a risk assessment to support their decision as the increased strength of men might result in an increased in the number and security of injuries when men compete against women in this sports.”

Transexual People and Competitive Sport:  
Guidance for National Governing Bodies of Sport

**Risk Assessment for Safety?**

- General principle: can't discriminate on grounds of sex or gender - new or birth.
- UK law: protected characteristic under Equality Act 2010.
- But:
  - There are exceptions; there can be lawful discrimination.
  - Sport is one.
  - Key phrase: “strength, stamina or physique”
    - Essentially: where physical mismatch raises safety or performance concerns.

## Lawful Discrimination

- Sex Discrimination Act 1984, Australia.
  - s. 42 Nothing... renders it unlawful to discriminate on the grounds of sex... by excluding persons from participation in any competitive sport activity in which the strength, stamina or physique of competitors is relevant.
  - s. 66 Exception - competitive sporting activities.
    1. A person may exclude people of one sex from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.
- Also in s. 42.

# Sex Discrimination Act 1984

- Physique... is a broad term and includes physical powers, height, weight and overall body shape, build, structure or appearance.”
- Goalkeeper in mixed ice hockey - non-contact position, so physique not relevant.
- Was relevant for contact positions in a contact sport.
- Likely to be relevant for any position in a mixed collision sport

## Robertson v. Australian Ice Hockey Federation [1998] VADT

- Women registering as boxers in NSW.
- Decided on other grounds, but looked at s. 42 - “strength, stamina or physique”.
- 90. First, unless s. 42 (1) is concerned only with mixed-sex activity, it is difficult to see the point of limiting its operation to activities in which the strength, stamina or physique of competitors is relevant.

**Ferneley v. Boxing Authority of  
NSW [2001] FCA 1740**

- Elite-level skiff sailing - 49er class.

186 - “Unlike a goal keeper, the helm does not operate in a separate and distinct part of the boat... I find that the helm and the crew operate in tandem to sail the skiff and respond to the conditions on the day. They are more akin to the various players on the hockey field rather than the goal keeper....Whilst the crew may require greater strength than the helm, that does not lead to the conclusion that the strength, stamina and physique of the helm is not relevant in the sense discussed in Robertson

187 - On the basis of the evidence before me, I accept that strength, stamina and physique are relevant to elite competition sailing, including the role of the helm on a 49er and a 49FX.

**Coady v. Yachting Victoria  
Inc.[2019] FCA 2205**

- s. 19 (1), (2), GRA 2004 An organising body can restrict people from competing in their new gender in a gender-affected sport if it is necessary for a) fair competition or b) the safety of competitors.
- s. 19 (4) A sport is a gender-affected sport if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport.

## UK Legislation - Gender Recognition Act 2004

- “Man” defined as “male of any age” and “woman” as “female of any age” - sex-based definition.
- s.195
  - 1) A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity a) fair competition, or b) the safety of competitors.
  - 2) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity

# UK Legislation - Equality Act 2010

- Legal under UK and other law to restrict transgender players where the average strength, stamina or physique of one sex would raise a fairness or safety issue against an average player of the other.
- “Strength, stamina or physique” likely to be read as in Australian cases - precedents.
- Average build is relevant
- If physique a safety factor in contact sport - Robertson - likely to be such in a collision sport - Newlands

**“Strength, stamina or physique”**

- Civil cases - civil standard
- Balance of probability - “More likely than not”
- Need to show:
  - Duty of care
  - Breach of duty
  - Fair/just/reasonable to impose liability
- Social utility of sport - protected
  - Specific legislative protection, eg Ireland.
- But: Courts will impose where they feel it's warranted
  - Look to case law for when they feel it will be

## Burden of Proof

- Would have to show risk higher than would otherwise have been without current policy
- Will be shaped by expert scientific evidence
- Evidence as to what is considered gendered in other sports will be relevant
- Very hard to argue a collision sport is not physique-dependent
- That physique has been key in other safety laws in rugby would be a very significant pointer for Courts.

## Evidence Threshold for Harm

- WR now very different structure to Agar v. Hyde
- Legitimate basis on equality law to impose restrictions if evidence is a collision sport is a gendered one where strength, stamina, physique relevant.
  - Statutory exemption on human rights basis
  - Lawful, necessary, proportionate?
- Unions have to follow WR policy, so WR has a duty not to “increase the risk of harm to participants” - Agar v. Hyde.
- If a personal injury case happens on foot of a WR policy, WR is unlikely not to be brought in.

## WR Liability?

- Segregation by natal sex is a rule made to make the game safer
- Removing it requires a proper risk assessment
- If it makes the game more dangerous, it could lead to liability
- There is a specific exemption in equality legislation
- Case law suggests “strength, stamina and physique” are the key for using the exemption.

## Summary



# Sports Law Bar Association of Ireland